***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S REPLY BRIEF

Office Copy

75-7053

*To be argued by*
JOSEPH ARTHUR COHEN

# United States Court of Appeals

FOR THE SECOND CIRCUIT

WILLIAM GARAFOLA,
*Plaintiff-Appellee,*

—against—

F. A. DETJEN, "SAAR",
*Defendant & Third Party Plaintiff,*

—against—

PITTSTON STEVEDORING CORP.,
*Third Party Defendant-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

## REPLY BRIEF OF THIRD PARTY DEFENDANT-APPELLANT

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## REPLY BRIEF OF THIRD PARTY DEFENDANT-APPELLANT

### Statement

This brief is submitted in reply to certain assertions made by the plaintiff-appellee in his brief which have no basis either in law or in fact.

### POINT I

**The Failure of Third Party Defendant-Appellant to Move for a Directed Verdict Does Not Bar Raising on This Appeal the Issue of Whether the Jury Verdict for Plaintiff Was Supported by the Evidence.**

Plaintiff in his brief asserted that the failure of third party defendant to move for a directed verdict at the end of plaintiff's case and at the end of the entire case pre-

cludes it from raising on this appeal the question of whether the evidence at the trial is sufficient to support a verdict in favor of the plaintiff and against defendant, shipowner. Such assertion is patently incorrect *under the facts of this case.* Thus it is admitted by the plaintiff that defendant's attorney did in fact move for failure to make out a prima facie case at the end of the plaintiff's case (101a),* and that defendant's attorney also moved for a directed verdict with respect to the plaintiff's case at the end of defendant's case (119a-120a).

In addition, it is not controverted that defendant's attorney through the renewal of his prior motions at the end of the entire case thereby once again moved for a directed verdict regarding the plaintiff's case at the time (134a). It is respectfully submitted that in view of the fact that defendant's attorney made all required motions, third party defendant was and is entitled to rely thereon in support of its present appeal.

It is admitted that General Rule 50b FRCP requires that a party moving for judgment notwithstanding the verdict must previously have moved for a directed verdict. However, such rule has no application whatsoever in a case where a defendant has properly made such motions and it is the third party defendant that wishes to rely upon the same in support of its position on appeal. This can be made crystal clear by an analysis of the policy underlying such rule. As pointed out by the Court in the case of *Little* v. *Bankers Life and Casualty Co.*, 426 F. 2d 509 (5 Cir. 1970) a primary reason for this rule is as follows (426 F. 2d 511):

> "The reasons behind the rule are sound. For example, a litigant may not gamble on the jury's verdict and

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* Unless otherwise indicated, these references are to pages of the Joint Appendix.

then later question the sufficiency of the evidence on appeal. Taylor v. Gulf States Utilities Company, 5 Cir., 1967, 375 F. 2d 949, 950. Similarly, the litigant who has not moved for a directed verdict in the trial court must have been of the view that the evidence made a case for the jury; he should not be permitted on appeal to impute error to the trial judge for sharing that view. See 2B Barron & Holtzoff, Federal Practice and Procedure, §1081, at 424 (Wright rev. ed. 1961.)"

Surely in this case such reasoning is entirely inapplicable in that any failure on the part of the third party defendant to move for a directed verdict was predicated solely and entirely upon its reliance on such motion as was made by defendant's attorney. It can therefore not be said that this third party defendant in view of its failure so to move "gambled" on the jury's verdict or that it was "of the view that the evidence made a case for the jury."

A further rationale for such rule has been eloquently stated by Prof. Moore, and quoted by this Court in *Oliveras* v. *American Export Isbrandtsen Lines, Inc.*, 431 F. 2d 814, 816 (2d Cir. 1970). As so stated by Prof. Moore the purpose of this rule permitting only parties who have moved for a directed verdict to seek the benefit of judgment n.o.v.:

"* * * is to avoid making a trap of the latter motion. At the time that a motion for directed verdict is permitted, it remains possible for the party against whom the motion is directed to cure the defects in proof that might otherwise preclude him from taking the case to the jury. A motion for judgment n.o.v. without prior notice of alleged deficiencies of proof, comes too late for the possibility of cure except by way of a complete

new trial. The requirement of the motion for directed verdict is thus in keeping with the spirit of the rules to avoid tactical victories at the expense of substantive interests. 5 Moore, Federal Practice §50.08 at 2359."

Surely such reasoning eloquently shows that the rule relied upon by plaintiff has no application in this case. Thus since a motion for a directed verdict was in fact made by defendant's attorney, any failure on the part of third party defendant so to move could result in no tactical victory on the part of third party defendant at the expense of the plaintiff's substantive interests. *A similar motion by third party defendant would only be redundant.* The making of the motions by the defendant clearly brought home to the plaintiff the possibility that his proof was not sufficient to justify a verdict in his favor. By these motions the plaintiff was put on notice of the alleged deficiencies of proof of his case at a time when it was possible for him to cure the same.

It follows from the foregoing that the third party defendant was justified completely in this case in relying upon defendant's motion for a directed verdict. It can therefore justifiably contend as it was contended in the main brief herein submitted on behalf of the third party defendant that the lower Court erred in failing to grant the defendant's motion for a directed verdict and that it similarly erred in failing to grant both the defendant's and this third party defendant's motion for judgment n.o.v. The cases relied upon by plaintiff at Pages 14 and 15 of its brief are therefore totally inapposite and distinguishable in that neither of them involve the situation such as presented in this case where it is a *third party defendant* that is justifiably relying upon a defendant's motion for a directed verdict.

Furthermore, assuming arguendo the rule to be as asserted by plaintiff, it is yet respectfully submitted that such rule has not prevented this Court from reviewing the facts underlying a jury determination and grantnig a new trial despite the failure of a party to move for a directed verdict. *Oliveras* v. *American Export Isbrandtsen Lines, Inc., supra.* For similar decisions by other Circuit Courts in order to avoid "manifest miscarriage of justice" see *A.B. McMahan Co.* v. *Amphenol Corp.*, 445 F. 2d 1072, (8 Cir. 1971); *Cowager* v. *Arnold*, 460 F. 2d 219 (3d Cir. 1972).

The *Oliveras* case, *supra*, in its procedural setting is strikingly applicable to the case at bar. That was an action by a seaman to recover damages from a shipowner on the theories of negligence and unseaworthiness. On trial the jury found that the vessel was not unseaworthy. The issue of negligence on the part of shipowner was pressed in the Court below and was considered to have been waived on appeal. Thus the sole issue on appeal was whether the evidence before the jury was sufficient to sustain its verdict that the vessel was not unseaworthy.

It is crucial to note that in the Court below the plaintiff had not moved for a directed verdict, had not objected to the submission of the issue of unseaworthiness to the jury and had taken no exception to the Judge's charge. However, after the verdict had been returned the plaintiff moved to set it aside as against the weight of the evidence and erroneous as a matter of law. On appeal it was contended that the failure of the plaintiff to properly move for a directed verdict precluded the plaintiff from moving to set aside the same under the identical rule relevant in this case. Such contention was emphatically rejected by this Court, which held in substance that it would not permit a *procedural mistake* such as the failure to move for a

directed verdict to obscure the demands and dictates of substantive justice. In granting a new trial this Court noted that it had the power to review the disputed facts and upon their review to determine the issue of unseaworthiness and, concluded (431 F. 2d 817):

> "To rule that an unintended flaw in procedure bars a deserving litigant from any relief is an unwarranted triumph of form over substance, the kind of triumph which, commonplace enough prior to our more enlightened days, we strive now to avoid whenever possible."

Surely what is here present is at most an unintended flaw in procedure on the part of the third party defendant in relying upon shipowner's motion and in failing to merely join in the same. Nothing would have been added to the trial of this action if third party defendant had done so and no rights of any party herein are diminished by virtue of its failure so to do. To permit therefore such unintended flaw in procedure to bar the third party defendant from placing on appeal the issues validly presented in this case would create but an unwelcome and unwarranted intrusion and triumph of form and ritual over substance, criticized by this Court in *Oliveras, supra.*

In this regard it should be noted that as in *Oliveras* the issue of shipowner's negligence is not in this case, the jury having rendered a verdict for the plaintiff solely for unseaworthiness of the vessel. It follows, as day follows night, that this Court under its decision in *Oliveras* has the power to review the undisputed facts in this case to determine that issue.

Under the facts in this case and in accordance with the reasoning and argument presented in Point I of this third party defendant's brief it is crystal clear that the proof

was totally devoid of any evidence showing an unseaworthy condition of the vessel proximately causing the plaintiff's accident. Quite the contrary is true.

The proof in this case showed incontrovertibly that the sole and proximate causes of the within accident to the plaintiff was the isolated and personal negligent act of the plaintiff's co-workers, longshoremen, in failing to provide him with a portable ladder as a means of egress from the hatch. Such proof is conclusive that there was no other and further unseaworthy condition or claim regarding the subject vessel. In addition the evidence is uncontradicted that such failure to provide a portable ladder was solely the responsibility of third party defendant and not of shipowner, that shipowner was never requested to provide any such portable ladder and was without any notice or knowledge whatsoever, either actual or constructive of any alleged need for the same.

In these circumstances the accident resulted solely from the operational negligence of the plaintiff's fellow longshoremen for which the defendant shipowner is not liable. *Usner* v. *Luckenbach Overseas Corp.*, 400 U.S. 494, 91 S. Ct. 514 (1971). The plaintiff in his brief attempts to push aside *Usner* by merely stating that it is inapplicable. Such will not do. There is nothing set forth in the plaintiff's brief supporting such alleged inapplicability of *Usner* to the facts of this case. On the contrary, as pointed out in Point I of this appellant's brief, *Usner* is in fact controlling and determinative of the issues presented herein.

## POINT II

**The Utilization by Counsel for the Plaintiff of the Safety and Health Regulations for Longshoring as Part of His Case Against the Defendant Constituted Reversible Error Warranting a New Trial.**

In arguing that reliance on the Safety and Health Regulations by the Court below was without error the plaintiff's attorney overlooks the fact that he read such Regulations to the jury as part of his case against shipowner thereby making such Regulations part and parcel of his case against shipowner and thereby relying on the same. Thus immediately prior to the reading of such Regulations by plaintiff's counsel the following colloquy occurred (98a):

> "Mr. Stanziale: May I have a five-minute recess?
>
> Mr. Bushlow: May I finish this? I'm almost finished with the plaintiff's case.
>
> Mr. Stanziale: All right.
>
> Mr. Bushlow: If your Honor please, that is the plaintiff's fact witnesses. But I ask his Honor to take judicial notice of the safety and health regulations.
>
> Mr. Stanziale: You are not going to read it now?
>
> Mr. Bushlow: I want to read the pertinent parts to the jury now."

The record also reflects that appropriate objection to the reading of such regulations by the plaintiff as part of his case was thereafter made by counsel for third party defendant-appellant (98a-99a).

Surely such reading of the Regulations to the jury by plaintiff's counsel was severely prejudicial to shipowner and third party defendant in that an inference was thereby

clearly created that such Regulations were part of the plaintiff's case and were binding on the shipowner with respect to the plaintiff's action against it. The confusion resulting from the very own acts of plaintiff's counsel in so reading the Regulations to the jury was thereafter compounded by the Court's charge in the course of which the Court charged such Regulations to the jury without distinguishing whether they were applicable only to the shipowner's case against the stevedore or whether they were in fact applicable to the plaintiff's case against Shipowner as well.

Thus the Court in its charge first instructed the jury with respect to the plaintiff's case and then embarked upon a portion of the charge apparently relating to the shipowner's claim against the stevedore (191a-192a). It thereafter read the foregoing Regulations to the jury (192a-193a-194a). Immediately thereafter counsel for the plaintiff again interjected himself with respect to such Regulations (194a) and requested the reading of certain further Regulations. Surely counsel was unwarranted in so doing since such Regulations had no proper connection or relevance whatsoever to his own case. Such meddling by counsel for the plaintiff with matters such as the effect of the Regulations which were totally not his concern could have only had the effect of creating an inference in the jury's mind that such Regulations were binding on the shipowner in the plaintiff's action against it. Surely there is no other purpose whatsoever that could have been served by counsel for the plaintiff interjecting himself in matters which were not his concern other than to compound confusion. The inference is inescapable that counsel for the plaintiff in fact intended to do so in the hope that he would be the ultimate beneficiary of the confusion so compounded, as indeed in fact occurred.

In view of the fact that it was counsel for the plaintiff's own activities in interjecting himself in the jury charge

with respect to such Regulations which created the confusion in the jury's mind and confusion in the charge, it ill behooves him at the present time to complain of the fact that counsel for third party defendant did not attempt to relieve him of the consequences of the confusion which he had himself created.

It should furthermore be noted in this regard that immediately after such interjection by counsel for the plaintiff with regard to the further reading of Regulations, which were none of his concern, the Court, after reading such Regulations (194a-195a), immediately proceeded to charge the jury *with various other and sundry aspects and portions of the plaintiff's case* (195a-200a). Thus the Court went on to charge the jury with such other aspects of the *plaintiff's case against shipowner* such as the plaintiff's burden of proof, the effect of expert testimony, etc.

If the jury was not confused enough already into assuming that the Regulations were part and parcel of plaintiff's case by the groundless interjection into the proceedings by counsel for the plaintiff, referred to above, it must surely have been so convinced when the Court itself, *after reading such Regulations to the jury, proceeded to charge the jury with the various other aspects of the plaintiff's case referred to above.*

It is furthermore respectfully submitted that despite the assertion to the contrary by plaintiff at pages 26-28 of his brief, this Court has in fact held in *Albanese* v. *N.V. Nederl. Amerk Stoomv. Maats,* 346 F.2d 481 (2 Cir. 1965), rev'd on other grounds, 382 U.S. 283 (1966), and *Bernardini* v. *Rederi A/B Saturnus,* 2nd Cir., Docket No. 74-1404, Calendar No. 113 that the improper use of the Safety and Health Regulations is an independent ground for reversal as stated by this Court in such cases. No amount of casuistry or

reliance by the plaintiff upon the Supreme Court's dictum in *Albanese* can obscure that fact.

In attempting to distinguish *Albanese* and *Bernardini* the plaintiff asserts that in this case the Regulations were applied by the Court only with respect to the indemnity action. Such contention is incorrect as shown above. Furthermore counsel for the plaintiff points out that in both cases shipowner's counsel objected to the use of such Regulations as part of the plaintiff's case, unlike the failure of the shipowner so to object in this case. However, there is is no question but that third party defendant properly and timely objected to the use of such Regulations as part of the plaintiff's case, as noted above. The failure of shipowner to join in that objection for reason of its own should not be binding upon this third party defendant and should not preclude it from urging such error on this appeal.

It is respectfully submitted that enough has been shown to warrant the conclusion by this Court that the jury was in fact confused regarding the possible scope and effect of the Regulations, which confusion is reflected by its verdict herein warranting and indeed mandating a new trial. When such confusion as to the effect of the Regulations is considered together with the very tenuous evidence at most of unseaworthiness in this case it follows that the interests of justice would best be served by a new trial herein.

## POINT III

### The Award of $235,000 Was Grossly Excessive.

It is not and cannot be the object of this reply brief to repeat verbatim the arguments presented in Point III of this third party defendant's main brief regarding the excessiveness of the award. Although strictly speaking

awards in other cases are surely not binding in this Court yet they are illustrative of recoveries upheld by this Court and other Courts in cases involving similar and even more severe injuries. As such they surely afford some basis or standard for determining that in fact the plaintiff's verdict in this case was grossly excessive. Even a brief recitation of the plaintiff's claims make apparent the specious nature thereof. We are discussing future and past loss of earnings on the part of a man who was 63 years of age at the time of his accident and who was 68 years old at the time of his trial. Surely it is unreasonable to assume without any substantive evidence in support thereof that the plaintiff would have continued working past the age of 65. Thus his loss of earnings must be calculated to be in the area of $22,000 at the very maximum which taken together with his alleged medical expenses of $16,000 projects a total claim for such damages in the area of approximately $38,000. Surely this Court should not permit any speculation or conjecture as to any further loss of earnings on the part of the plaintiff past age 65. It surely transcends the bounds of reason and common sense to contend, as does the plaintiff, that he would have continued working until age 73. It follows that the total special damages of $95,000 claimed by the plaintiff on Page 33 of his brief is the result of the sheerest speculation.

If we are correct that the actual special damages sustained by the plaintiff is in the sum of approximately $38,000, it cannot be seriously controverted that the balance of the verdict of $235,000 in the plaintiff's favor, *representing an award of approximately $195,000 to the plaintiff for pain and suffering alone is wholly and grossly excessive as a matter of law.* On the other hand, both the cases cited and discussed in Point III of the third party defendant's prior brief and his actual special damages

referred to above in the sum of approximately $38,000 clearly demonstrate that a remittitur of at least $100,000 would be just and would adequately compensate the plaintiff for the injuries sustained by him and for his pain and suffering in the course thereof. There should either be a new trial in the interests of justice, or in the alternative there should be a remittitur of at least $100,000.

## CONCLUSION

The judgment of the Court below should be reversed and plaintiff's action dismissed as a matter of law by reason of plaintiff's failure to establish a prima facie case of unseaworthiness. In the alternative, it is requested that either a new trial be had or a remittitur of at least $100,000.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK )
: SS.:
COUNTY OF NEW YORK )

**MARGARET V. CONWAY**, being duly sworn, deposes and says:

That she is over eighteen years of age and is not a party to the within action. That on the 21 day of May, 1975, she served ~~a true copy~~ two copies of the annexed

**REPLY BRIEF OF THIRD PARTY DEFENDANT APPELLANT**

on

**KIRLIN, CAMPBELL & KEATING, ESQS.,**
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herein, by depositing a true copy of the aforesaid properly enclosed in a securely sealed and postpaid wrapper in a Post Office box under the exclusive care and custody of the Government of the United States, at 801 Second Avenue, in the Borough of Manhattan, City and State of New York, addressed to the aforesaid as above stated, and that said address(es) was (were) the address(es) designated by the said attorney(s) as the address(es) within the State of New York, where papers in this action might be served.

Margaret V. Conway

Sworn to before me this
21st day of May, 1975.

Joseph Arthur Cohen
Notary Public

JOSEPH ARTHUR COHEN
NOTARY PUBLIC, State of New York
No. 60-5741575
Qualified in Westchester County
Commission Expires March 30, 1976